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In The

Supreme Court of the United States

October Term, 1994

44 LIQUORMART, INC. and PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND, and RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REBECCA TEDFORD PARTINGTON
Special Assistant Attorney General
Department of the Attorney General
72 Pine Street
Providence, RI 02903
(401) 274-4400 Ext. 2303

Attorney for Respondent
State of Rhode Island

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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R.I. Gen. Laws § 3-8-7

R.I. Gen. Laws § 3-8-8.1

Regulation 32, Rhode Island Liquor Control Administration

STATEMENT OF THE CASE

Pursuant to the Twenty-first Amendment's grant of power, the State of Rhode Island has adopted a statutory scheme for the regulation of alcoholic beverages. R.I. Gen. Laws § 3-1-1 through § 3-14-15, inclusive. The stated purpose of this statutory scheme is the "promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5. An integral part of that scheme includes a prohibition on the advertising of the *price* of alcoholic beverages by the Rhode Island media, and by the license holders themselves. R.I. Gen. Laws §§ 3-8-7 and 3-8-8.1.

On December 17, 1991, Petitioner 44 Liquor Mart, Inc. ("44 Liquor Mart") was found to be in violation of R.I.

Gen. Laws §§ 3-8-7 and 3-8-8.1 and Regulation 32 of the Rhode Island Liquor Control Administration, which also prohibits price advertising. 44 Liquor Mart was fined for that violation, paid the fine, but did not take advantage of the appeal process provided by state statute.[1] Subsequently, Petitioners filed a constitutional attack on the price advertising ban in the Federal District Court for the District of Rhode Island. *44 Liquor Mart, Inc. v. Racine*, C.A. No. 92-0115-P.[2] Petitioners' claims were based on the First Amendment of the United States Constitution; the Equal Protection, Due Process and Commerce Clauses of the United States Constitution; the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 and 42 U.S.C. § 1983, the Civil Rights Act. Before trial, Petitioners abandoned all but their First Amendment claims.[3]

During discovery, Petitioners conceded that they would each realize an economic benefit of more than $100,000 per year if the price advertising ban were lifted. Prior to trial, the parties stipulated (among other things) that Rhode Island communications media reaches both

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[1] Petitioner People's Super Liquor is not a Rhode Island license holder. No administrative action has ever been taken against it.

[2] These statutes have survived identical constitutional attacks within the Rhode Island court system. *See Rhode Island Liquor Stores Ass'n v. The Evening Call*, 497 A.2d 331 (R.I. 1985), and *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985).

[3] The First Circuit intimated that Petitioners may have had a cognizable claim under the Commerce Clause, but by waiving it at the District Court level, they abandoned it forever. 39 F.3d at 9, Petitioners' Appendix 11, 12.

Rhode Island and Massachusetts citizens, that the proposed speech (liquor price advertising) does not concern an illegal activity and presumably would not be false or misleading, and that the State of Rhode Island has a substantial interest in regulating the sale of alcoholic beverages. Petitioners' Appendix at 5, 21-22[4], *44 Liquor Mart Inc. v. Racine*, 829 F. Supp. 543, 545 (D.R.I. 1993). Pet.App. 21, 22.

After a trial which consisted of the submission of an agreed statement of facts and the videotaped depositions of three experts with supporting exhibits, the District Court found for the Petitioners. In striking down the advertising ban, that Court held that in a commercial speech analysis, the Twenty-first Amendment had no application.[5] *44 Liquor Mart Inc. v. Racine, supra* at 553; Pet.App. 42. The decision was appealed, and on October 24, 1994, the First Circuit Court of Appeals reversed, and

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[4] References to Petitioner's Appendix are hereinafter designated as "Pet.App.".

[5] The District Court applied the four-part test developed in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566, Pet.App. 35.

in upholding the statute, stated that the Twenty-first Amendment should be considered in a commercial speech case involving regulation of alcoholic beverages. *44 Liquor Mart, Inc. v. State of Rhode Island*, 39 F.3d 5 (1st Cir. 1994), Pet.App. 2-12.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Petitioners' application for a writ of certiorari as the First Circuit's decision does not conflict with any decision of this Court, and is not in conflict with any decision of any other Circuit. Further, the Petition should be denied since the First Circuit correctly phrased and applied the standard for determining whether this commercial speech may be regulated by the State. Finally, the Petition should be denied since this Court's summary dismissal in *Queensgate Investment Company v. Liquor Control Commission*, 69 Ohio St. 361, 433 N.E.2d 138 (1982), appeal dismissed, 459 U.S. 807 (1982), is controlling.

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT SHOULD BE CONSIDERED IN A COMMERCIAL SPEECH CASE INVOLVING THE REGULATION OF ALCOHOLIC BEVERAGES

Petitioners incorrectly set the stage for this Court's review of the proceedings below when they state:

> The Court of Appeals thought it 'precisely in order' to give Rhode Island's restriction on

> speech an 'added presumption of validity' because of the use of that phrase in *California v. LaRue*, 409 U.S. 109, 118-119 (1972) (App. 8). The effect of the added presumption was to eliminate the state's burden to prove the validity of the price advertising ban under *Central Hudson* and to put the burden of proving invalidity on the petitioners.

Petition, pp. 7-8.

The First Circuit did *not* place the burden on Petitioners to prove the invalidity of the statute. Rather, they stated that "The burden is on the party seeking suppression, **here the State**." *44 Liquormart, Inc. v. State of R.I., supra* at 7, Pet.App. 5 (emphasis added). Later in its decision, the First Circuit reiterated that "**the state has the burden [of proof]** . . . " *Id.*

The placement of the burden, and indeed, the articulation of the burden itself, is the cornerstone of this Petition. As phrased, and as placed, the burden imposed by the First Circuit is in harmony with prior decisions of this Court, and is not in conflict with opinions from other Circuits, as Petitioners allege. The First Circuit simply afforded the Rhode Island statutes an "added presumption of validity" since alcoholic beverages were the subject of regulation. *California v. LaRue*, 409 U.S. at 118-119. From that point, the First Circuit correctly applied the four-part *Central Hudson* test set out *supra* n.5. Petitioners contend that the First Circuit's opinion is in conflict with the Fifth Circuit's decision in *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983).[6] A cursory review of both 44

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[6] While the Fifth Circuit's decision was a plurality, it has remained good law for over eleven years.

Liquormart, Inc. and *Dunagin* clearly shows that the decisions do not conflict, rather, that they are in total harmony.

In *Dunagin,* the Fifth Circuit had the opportunity to review the constitutionality of Mississippi's near total ban on alcoholic beverage advertising. The challengers to the ban argued that it violated the First Amendment. In upholding the constitutionality of Mississippi's advertising restrictions, the Fifth Circuit discussed in detail the fact that alcoholic beverages were the subject of regulation *before* it launched into its *Central Hudson* analysis. This is entirely consistent with the First Circuit's decision and therefore Petitioners' Writ of Certiorari should be denied.

In *Dunagin,* the Fifth Circuit articulated what has come to be known as the "vice" argument. The *Dunagin* Court stated "[i]f there is any instance where a state can escape First Amendment constraint while prohibiting truthful advertising promoting lawful sales, it would be where the product being sold is intoxicating liquor". *Id.* at 743. The Fifth Circuit noted that Section 2 of the Twenty-first Amendment:

> is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product-intoxicating liquors. (citation omitted).

Id. at 744.

In delineating the test to be used when considering alcohol advertising restrictions, the Fifth Circuit asserted

that any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. The Court determined that it should proceed from a vantage point of "presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme". *Id.* at 744. Further, as pointed out in *Dunagin*, "the Supreme Court has twice, in examining the interface of the First and Twenty-first Amendments, given an unusual amount of deference to state liquor regulations". This is a reference to the cases of *California v. LaRue, supra,* and *New York State Liquor Authority v. Bellanca,* 452 U.S. 714 (1981). Both of those cases give states wide latitude to accomplish a permissible end, based upon the Twenty-first Amendment. This Court cautioned in both *LaRue* and *Bellanca* that because of the Twenty-first Amendment, such policy judgments should be made by the state legislature and not by the courts.

In placing the burden, the Fifth Circuit applied the *Central Hudson* four-part test with *LaRue* and *Bellanca* in mind, and found that the statute banning liquor advertisements passed constitutional muster. *Dunagin,* 718 F.2d at 750. This is in no way in conflict with the First Circuit's opinion in the present matter and therefore no grounds exist to grant *certiorari.* It is difficult to see how the Fifth and First Circuits differ as Petitioners suggest. They simply do not and the two decisions are harmonious.

Contrary to Petitioners' assertions (Petition, p. 13), the decision of this Court in *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116 (1982), *supports* the State's position in this

case. In *Larkin*, a zoning regulation was held to violate the Establishment Clause.[7] This Court, citing *California v. LaRue, supra*, stated that: "Given the broad powers of states under the Twenty-first Amendment, judicial deference . . . is especially appropriate in the area of liquor regulation." 459 U.S. at 121, 122.

The First Circuit's decision below also dovetails with that of the Tenth Circuit in *Adolph Coors v. Brady* (*Coors I*), 944 F.2d 1543 (10th Cir. 1991) and *Adolph Coors v. Lloyd Bentsen* (*Coors II*), 2 F.3d. 355 (10th Cir. 1993). In striking down a labeling provision, the Tenth Circuit correctly found that the government's authority to prohibit alcohol content in *advertising* was constitutional. It is clear that the First Circuit's decision evinces no conflict with any decision of this Court, nor of any Circuit.

II. THIS COURT'S SUMMARY DISMISSAL OF *QUEENSGATE INVESTMENT COMPANY V. LIQUOR CONTROL COMMISSION* MANDATES REJECTION OF THE INSTANT PETITION.

The case of *Queensgate Investment Company v. Liquor Control Commission, supra*, requires that the instant petition be denied. In that case, Queensgate Investment Company (hereinafter "Queensgate") was the holder of an Ohio liquor permit and was prosecuted for violating regulations of the Ohio Liquor Control Commission which prohibited off-premises price advertising of alcoholic beverages, the exact prohibition found in Rhode Island's challenged laws. After being found in violation of the

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[7] Commercial speech was not implicated.

above regulations, Queensgate appealed to the Ohio Supreme Court, and argued that the price advertising ban violated its First Amendment guarantee of freedom of speech.

In determining that the price ban did *not* violate the First Amendment, the Ohio Supreme Court applied the four part *Central Hudson* test, *supra*. The *Queensgate* court came to the logical conclusion that the advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages. It determined that no less extensive a regulation would achieve the same purpose. "Rather, in order to serve the same governmental interest, virtually any other regulation would be more extensive; *e.g.*, increased prices, shorter hours or reduced number of permits, would all place a greater burden on the permit holder." *Id.*, 433 N.E.2d at 141-142. Queensgate then appealed to this Court. The Ohio Liquor Control Commission filed a Motion to Dismiss the appeal for want of substantial federal question. This Court agreed with the Liquor Control Commission, and dismissed the case on that ground.

The First Circuit in the case *sub judice* discussed the effect of *Queensgate*, noting that there was no relevant factual distinction, and held that "with *Queensgate* or without, plaintiff 44 Liquormart must lose". 39 F.3d at 8, Pet.App. 9. Recognition of the precedential effect of *Queensgate* would be consistent with the Circuits.

In *Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490, 497 (10th Cir. 1983), an Oklahoma constitutional provision disallowed all alcohol advertising except one sign at the retail outlet bearing the words "retail alcoholic

liquor store". After a review of the regulations involved in *Queensgate*, the Tenth Circuit found that in both cases, the State, acting under its Twenty-first Amendment powers, had chosen to prohibit some, but not all, forms of liquor advertising with the goal of decreasing the consumption and abuse of alcoholic beverages. It held that the constitutional question presented in *Queensgate* and *Oklahoma Telecasters* was substantially the same. *Id.* at 497.

In the view of the Tenth Circuit in *Oklahoma Telecasters*, *Queensgate* presented an issue concerning the tension between the First and Twenty-first Amendments. *Id.* The Tenth Circuit recognized that this Court decided that Ohio's regulation was *not* an unconstitutional infringement on Queensgate's First Amendment rights and recognized the binding effect of *Queensgate* on *all* federal courts. *Id.* The Tenth Circuit had this to say:

> The Supreme Court arguably may have decided the case on nonconstitutional grounds; if so, however, we cannot discern them. It is our view that the Supreme Court decided Ohio's regulation was not an unconstitutional infringement on the appellant's First Amendment rights. The *Queensgate* dismissal is binding on this court.

Id. at 497.

Apparently out of an abundance of caution, the Tenth Circuit undertook an independent review, and finally held that the regulations at issue passed constitutional muster:

> We again emphasize that the *Central Hudson* test is essentially a balancing test. When the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police

> power, the balance shifts in the state's favor, permitting regulation of commercial speech that might not otherwise be permissible. We believe that the Supreme Court's summary dismissal in *Queensgate* mandates this result.

Id. at 502.

The effect of a summary disposition at the U.S. Supreme Court level serves as binding precedent on lower federal courts. Cases before the Court by way of appeal must be resolved on the merits. However, not all cases within the courts' obligatory jurisdiction warrant plenary consideration, *i.e.*, oral argument by counsel and full opinion by the Court. The Supreme Court has thus fashioned a method to dispose of some appeals in a summary fashion. However, such summary dispositions nevertheless constitute resolutions of the merits of the claims presented. Once an issue is labeled "insubstantial" or otherwise resolved by a summary disposition, it is not open to lower court reconsideration. Dismissals of appeals for want of a substantial federal questions *are* decisions on the merits, and *are* binding upon lower courts. 12 Moore, Federal Practice ¶ 400.-05-1 (2nd Edition 1982).

The seminal case discussing the effect of a summary disposition is *Hicks v. Miranda*, 422 U.S. 332 (1975), where this Court ruled that dismissal for want of a substantial federal question *is* a decision on the merits of the case, and must be treated by lower courts as precedential authority.

The issue in *Queensgate* and in the present dispute is identical, *i.e.*, whether a ban on advertising the price of

alcoholic beverages violates the First Amendment's guarantee of free speech. The Ohio court used the four-part *Central Hudson* test, and when this decision and its reasoning were before this Court on appeal, it was held that no federal question was involved. This decision, while short, is nonetheless a decision on the merits, affirming a finding that no First Amendment rights were implicated by the price advertising ban. Therefore, *certiorari* should be denied on this ground alone.

III. THE FIRST CIRCUIT WAS CORRECT IN ITS APPLICATION OF THE *CENTRAL HUDSON* TEST TO THE STATUTES AND REGULATION AT ISSUE

There is no dispute that the *Central Hudson* four-part test applies in the instant matter.[8] The dispute arises with respect to whether, and to what extent, the Twenty-first Amendment affects the application of *Central Hudson*. The First Circuit did *not* hold that the application of the Twenty-first Amendment shifted the burden of proof as argued by the Petitioners. It simply held that the presumption of validity afforded by the Twenty-first Amendment was "precisely in order." 39 F.3d at 8, Pet.App. 8. It is obvious that the First Circuit made no shocking departure from the teachings of this Court, nor from other Circuit courts, in holding that the Twenty-first Amendment should be considered when applying the *Central Hudson* test.

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[8] The parties agreed that the first two elements had been met.

It is beyond dispute that the provisions of R.I. Gen. Laws §§ 3-8-7 and 3-8-8.1 enjoy the presumption of constitutional validity. *Donahue v. Rhode Island Department of Mental Health, Retardation and Hospitals*, 632 F. Supp. 1456 (D.R.I. 1986). The courts must, if possible, give effect to a state statute. *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220 (D.R.I. 1982). A party challenging the constitutionality of a statute has the burden of not just proving unconstitutionality, but proving it **beyond a reasonable doubt.** *Cardi Corp. v. State*, 524 A.2d 1092 (R.I. 1987); *Giebink v. Fischer*, 709 F. Supp. 1012 (D.Colo. 1989). Because of the State's power under the Twenty-first Amendment, a state statute regulating the sale of alcoholic beverages is entitled to an added presumption in favor of its validity. *LaRue, supra, Bellanca, supra, S & S Liquor Mart, Inc. v. Pastore, supra.* The Federal Courts do not sit as a "super-legislature" to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. This Court must proceed from a vantage point of *presumed* state power, and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme like Rhode Island's. *LaRue, supra.* "If there is any instance where a state can escape First Amendment constraint while prohibiting truthful advertising promoting

lawful sales, it would be where the product being sold is intoxicating liquor." *Dunagin, supra.*

A. The Advertising Restriction Materially Advances the Asserted Governmental Interest

This is a case in which the Rhode Island General Assembly has sought to alleviate a serious public health problem through a minor restriction of commercial speech. This Court has concluded that a legislature may reasonably presume that prohibitions of commercial speech are effective in reducing the incidence of an activity that is injurious to the public welfare. *Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico,* 478 U.S. 328, 343-45 (1986). Furthermore, in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), this Court ruled that the "accumulated common sense judgments" of the legislature should not be overturned unless they are "manifestly unreasonable". *Id.* at 509.[9]

The State has *absolute* power under the Twenty-first Amendment to prohibit the sale of liquor within its boundaries. *Bellanca, supra.* If a State has the power to totally abolish the sale of liquor, then there can be no argument that the power to regulate its sale is inherently implied. This Court, in *City of Newport, Ky. v. Iacobucci,* 479 U.S. 92, *reh'g denied,* 479 U.S. 1047 (1986), reaffirmed

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[9] The Tenth Circuit found in *Oklahoma Telecasters,* 699 F.2d at 501 that "prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the [alcoholic beverage industry] is based on a belief that advertising increases sales".

the holdings in *Bellanca* and *LaRue*, recognizing that the Twenty-first Amendment confers broad regulatory powers on the States. *Id. Iacobucci* confirms the propriety of the "added presumption" afforded by the Twenty-first Amendment in this case.

The Federal Courts give almost absolute deference to the states in the area of liquor control. In *Dunagin, supra*, the Fifth Circuit Court of Appeals considered a statute prohibiting liquor advertisements originating within the State of Mississippi. The Fifth Circuit analyzed the constitutionality of the Mississippi statute and noted that the Twenty-first Amendment "is unique in the constitutional scheme in that it represents the only express *grant* of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product – intoxicating liquors". *Id.* at 744. At the outset, the Fifth Circuit, citing *LaRue, supra*, acknowledged that there is an added presumption in favor of the validity of the statute banning advertising in that the Twenty-first Amendment confers "something more than the normal state authority over public health, welfare and morals." The *Dunagin* court held that the total advertising ban under scrutiny passed constitutional muster.

As pointed out in *Dunagin, supra*, it is because intoxicating liquor is, by its nature, dangerous to the morals, good order, health and safety of the people, that it is not to be placed on the same footing with the ordinary commodities of life. Therefore, statutes pertaining to control of alcoholic beverages within a state must be treated as *sui generis* apart from statutes of any other nature. See *Olitsky v. O'Malley*, 597 F.2d 295, 299 (1st Cir. 1979). Accord, *Garcia v. Arizona State Liquor Board*, 21 Ariz. App. 456, 520 P.2d 852 (1974).

Federal deference to state liquor control has been recognized in other cases, see, *e.g. LaRue, supra* (wide latitude as to the means to accomplish a permissible end must be accorded the state agency that is itself the repository of the State's power under the Twenty-first Amendment); *Olitsky supra* (given the presumption in favor of the validity of a state regulation within the compass of the Twenty-first Amendment, the question then becomes: were the regulations rational in light of the objectives sought?); *Hancock Industries v. Schaffer*, 811 F.2d 225 (3rd Cir. 1987) (it is not enough for one challenging the constitutionality of a statute to introduce evidence tending to support a conclusion contrary to that reached by the legislature); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) (reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind); *Bellanca, supra* (although some may quarrel with the wisdom of such legislation . . . the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts); *Oklahoma v. Burris*, 626 P.2d 1316 (Okla. 1980) (states have near absolute power to regulate liquor industry). In the present dispute, the State asserts that, in enacting the statutes, it was rational for the Rhode Island legislature to find that a ban on price advertising would further the goal of advancing temperance.

The State proffers the following theory as satisfying the third prong of *Central Hudson*:

> [T]he advertising ban directly advanced the governmental interest by increasing the cost of alcoholic beverages, thereby lowering the amount of alcohol consumption by residents of

> the State of Rhode Island. . . . [T]he State's power to totally ban any advertising about alcoholic beverages necessarily included the lesser power to restrict price advertising.

39 F.3d at 6, Pet.App. 3-4.

The third prong of *Central Hudson* does not require an empirically exact government showing if the prohibited speech concerns the sale of products associated with substantial societal harms. Rather, it provides that the regulation of commercial speech may not be sustained if it provides only "ineffective or remote support for the government's purpose. . . . " *Central Hudson*, 447 U.S. at 564. In *Posadas*, the majority found a duly sufficient constitutional "link" based on what the legislature of Puerto Rico "obviously believed," a finding the court characterized as a constitutionally "reasonable one" in these kinds of cases. 478 U.S. at 341-42. This Court was able to defer to the legislature on the basis of precedent that established the causal relationship between advertising and consumption. *Hornell Brewing Co., Inc. v. Brady*, 819 F.Supp. 1227 (E.D.N.Y. 1993) (citing *Dunagin, supra*, and *Oklahoma Telecasters, supra*).[10] Implicit in this Court's decisions cited

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[10] In a related context, this Court has recognized that people cross state lines to purchase beer at lower prices. See *Healy v. The Beer Inst.*, 491 U.S. 324, 326 (1989); *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437, fn.8 (1983). It is just such behavior, which reflects the close connection between consumer purchasing decisions and product information, that has led the lower federal courts and the state courts to uphold, against First Amendment challenges, state restrictions on price advertising. See *Queensgate, supra, S & S Liquor Mart, Inc., supra*. Part of the reason such restrictions reduce the consumption of alcohol, of course, is that they prevent alcohol vendors from engaging in

above is the basic notion that where certain socially harmful products are marketed or advertised, no exacting empirical proof is required. Where, for example, alcohol marketing is involved, the government need not remain hopelessly idle in combatting the social ills associated with this product until proof of certainty is tendered. Clearly, when it comes to products such as alcohol, *Central Hudson* and its progeny do not require an empirically strict showing. A constitutionally reasonable or sound link will suffice. *Metromedia*, 435 U.S. at 509.

In this case, abundant evidence was placed on the record in support of the State's case, and the First Circuit held that "there would seem inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales." 39 F.3d at 7, Pet.App. 7. The State's "substantial interest", *i.e.*, promotion of temperance and the reasonable control of the traffic in alcoholic beverages, R.I. Gen. Laws § 3-1-5 is of course advanced by the advertising restriction. Evidence presented at trial was, not surprisingly, contradictory. As the First Circuit noted "Even plaintiffs' expert, whom the [District] court credited,

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price competition. *Cf. Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.D.C. 1971) (ban on broadcast of cigarette advertising does not violate First Amendment), aff'd mem., 405 U.S. 1000 (1972); *Dunagin, supra* (prohibition of most forms of alcohol advertising does not violate First Amendment), cited with approval in *Posadas*, 478 U.S. at 347 n.10; *Oklahoma Telecasters, supra* (prohibition of all alcohol advertising except for one storefront sign does not violate First Amendment); *Princess Sea Indus., Inc. v. State*, 635 P.2d 281 (Nev. 1981) (restriction on brothel advertising does not violate First Amendment), cert. denied, 456 U.S. 926 (1982).

admitted that 'advertising has cumulative effects that are difficult to detect in studies, and that research studies have been varied and equivocal because it is a difficult topic to research.' " 39 F.3d at 7, Pet.App. 6. Even the District Court realized "[n]o less than twelve different conclusions have been reached regarding the impact of advertising on the general consumption of alcoholic beverages." 829 F. Supp. at 546, Pet.App. 22. The District Court also noted that:

> the distinguished economist John Kenneth Galbraith and the American Medical Association ("AMA") agree with [the conclusion that alcohol advertising leads to increased overall consumption]. (Tr. at 33-37). In 1986, [plaintiffs' expert] conceded, the AMA advocated a ban on alcohol advertising with the statement that such advertising affects youthful consumption and influences both brand preferences and the total volume of alcoholic beverages consumed by the public. (Tr. at 33-34). In addition, [plaintiffs' expert] acknowledged that advertising has cumulative effects that are difficult to detect in studies, and that research studies have been varied and equivocal because it is a difficult topic to research. (Tr. at 39-40).

829 F. Supp. at 548, Pet.App. 27.

While Petitioners place considerable stock in the statistic that Rhode Island is in the top 30 percent of states in total per capita consumption, (Petition at 7, 19, 20, 21, 23), this begs the question of where Rhode Island would be *without* the advertising ban.[11]

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[11] In a related context, it is extremely inappropriate for Petitioners to rely upon the New York State Moreland

Furthermore, this Court "assumes as a matter of law that advertising increases consumption of the product or service being advertised." *Cal-Almond v. U.S.D.A.*, 14 F.3d 429 (9th Cir. 1993) (citing *Posadas, supra*). Other courts facing similar factual situations have reached the conclusion advanced by the State herein – that advertising and consumption *are* directly linked. *See, e.g. Queensgate, supra,* (the advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; an advertising prohibition aids the interest in preventing that consumption); *Oklahoma Telecasters Ass'n, supra* (prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems); *Williams v. Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980) (an advertisement encouraging the use of drugs encourages actions which in fact endanger the health or safety of students); *Capital Broadcasting v. Mitchell*, 333 F. Supp. 582, 586 (D.D.C. 1971) (three-judge court), *aff'd mem.*, 405 U.S. 1000 (1972) (noting "close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people"). *No* witness disputed the State's evidence that price is an important determinant on the level of alcohol consumption. Since the State linked

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Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 3*, January 21, 1964. (Petition at 21). Petitioners attempted to have this report introduced at trial, but failed. Therefore, this Court should disregard any argument based on this report. Citation to the statements of members of this Court from the bench is also inappropriate. (Petition at 27).

price with consumption, it must be held that the third prong of *Central Hudson* has been met.

The District Court briefly alluded to three studies discussed by all of the experts – Stanley I. Ornstein and Dominique M. Hanssens, *Alcohol Control Laws and the Consumption of Distilled Spirits and Beer*, 12 J. Consumer Res. 200 (Sept. 1985); (relied upon by the State and its expert); Jon P. Nelson, *State Monopolies and Alcoholic Beverage Consumption*, 2 J. Reg. Econ. 83 (1990); and Gary P. Wilcox, *The Effect of Price Advertising on Alcoholic Beverage Sales*, 25 J. Advertising Reg. 33 (1985). In fact, the testimony of all three experts was based in large part on some or all of these articles. 829 F. Supp. at 546, Pet.App. 22-23.

The only article which dealt directly with price advertising bans over a period of time was that by Ornstein and Hanssens, which concluded that in states where price advertising is allowed, price should be lower and consumption greater, thus indicating a positive relationship between price advertising and per capita consumption. They concluded that price advertising leads to lower price and higher consumption. The reason for this is that a ban on price advertising raises the price by increasing search costs, and this results in lower consumption. This study alone supports the First Circuit's decision.

Common sense mandates a finding that price advertising increases consumption. Why else would this action have been filed? "It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results, or continue without realized results." *Dunagin, supra* at 749. It is not "unreasonable for the State of Rhode Island to

believe that price advertising will result in increased sales of alcoholic beverages generally". *Rhode Island Liquor Stores Assoc., supra,* at 336. "We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors. . . . [S]ufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect." *Dunagin, supra,* at 750. In *Central Hudson, supra,* this Court acknowledged that "[Central Hudson] would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the State interest and the [advertising ban]." *Id.* at 569. In *Bellanca, supra,* this Court deferred to the "common sense" conclusion of the legislature in enacting that ban. 452 U.S. at 718. See also *Metromedia, Inc., supra,* where this Court again relied on common sense in establishing a link between the governmental interest at stake and the legislation affecting commercial speech.

As this Court held in *Olitsky, supra,* the inquiry is whether it was rational for the legislature to assume that the prohibition directly advances the stated goal of temperance. Mathematical certainty is not required, nor is strict proof – only a rational belief that the statute advances the stated goals. In *Central Hudson,* this Court judicially noticed "an immediate connection between advertising and demand for electricity" and held that there was a "direct link between the state's interest in conservation and the Commission's order" (which banned promotional advertising by electric utilities.) *Central Hudson, supra* at 569. Similarly, in *Metromedia, Inc.,*

supra, this Court agreed with the "accumulated, commonsense judgments of local lawmakers" that "a legislative judgment that billboards are traffic hazards is not manifestly unreasonable" and that "[i]t is not speculative to recognize that billboards by their very nature . . . can be perceived as aesthetic harm." *Id.* at 509. Thus, San Diego's billboard ban directly advanced its substantial governmental interest of traffic safety and aesthetic appearance under the *Central Hudson* test. The *Dunagin* court held that "sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect."[12] Undisputed, scientific, laboratory tested proof is not required to establish this legislative fact. *Central Hudson, supra*. As taught in *Metromedia* and *Dunagin*, the Rhode Island General Assembly's belief that the ban on price advertising decreases the stimulation of liquor sales and consumption is entitled to great weight and should not be disturbed.

Finally, Petitioners take issue with the First Circuit's decision as being an improper election among conflicting facts. Petition at 16. To the contrary, it was proper for the First Circuit to conduct a review of the record, since, in a First Amendment challenge, an appellate court must "independently decide whether the record supports the judgment below." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 445, *reh'g denied*, 439 U.S. 883 (1978); *Rankin v. McPherson*,

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[12] The Fifth Circuit also found the decisions of other courts that have considered the connection between advertising and consumption and found a direct link to be persuasive. *See Dunagin, supra*, at 747-748.

483 U.S. 378, 385, n.8 (1987); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-511 (1984); *Dunagin, supra;* and *Oklahoma Telecasters, supra.*

B. The Advertising Restriction Is Narrowly Tailored to Advance the State's Substantial Interest

Petitioners would have this Court find that the statutes at issue go further than necessary to accomplish the stated purpose.[13] This Court has ruled that a prohibition of commercial speech requires a " 'fit' between the legislature's ends and the means chosen to accomplish those ends – a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is 'in proportion to the interests served' ". *Fox*, 492 U.S. 469, 480 (1989). The interest to be served by the statutes under attack is the promotion of temperance and the reasonable control of the traffic in alcoholic beverages. R.I. Gen. Laws § 3-1-5. Prohibiting disclosure of the price of an alcoholic beverage or price advantage is certainly a reasonable and effective way of preventing such harms. The restriction does not prohibit all alcoholic beverage advertising. Rather, only one tidbit of information is prohibited – price. And price advertising is allowed inside the licensed premises, to assist those who have *already decided* to purchase.

This Court and other courts have repeatedly upheld reasonable restrictions on the advertising of activities that

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[13] This, despite the observation of this Court that almost all restrictions disallowed under *Central Hudson's* fourth prong have been "substantially excessive." *Bd. of Trustees v. Fox*, 492 U.S. 469 (1989).

society deems harmful but has chosen for various reasons to tolerate. See *U.S. v. Edge Broadcasting Co.*, ___ U.S. ___, 113 S. Ct. 2696 (1993) (lotteries); *Posadas, supra,* (casino gambling); *Queensgate, supra* (per curiam) (liquor price advertising); *Capital Broadcasting Co. v. Mitchell, supra,* (broadcast cigarette advertising); *Dunagin, supra* (signs advertising liquor); *Oklahoma Telecasters Ass'n, supra,* (prohibition of all alcohol advertising except for one storefront sign); *S & S Liquor Mart Inc., supra,* (alcohol price advertising); *Rhode Island Liquor Stores Ass'n, supra,* (alcohol price advertising); *Princess Sea Indus., Inc., supra,* (brothel advertising). These decisions indicate that legislatures are entitled to especially broad latitude in regulating speech that promotes activities that the legislatures reasonably determine give rise to especially great social harms.

Greater deference to legislative judgment with regard to socially harmful activities is justified by the rationale underlying this Court's commercial speech doctrine. As a general matter, commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Fox*, 492 U.S. at 477 (quoting *Ohralik*, 436 U.S. at 456); see *Edge Broadcasting*, ___ U.S. at ___, 113 S. Ct. at 2703; *Central Hudson*, 447 U.S. at 563. That is because commercial speech "is 'linked inextricably' with the commercial arrangement that it proposes," Edenfield, ___ U.S. ___, 113 S. Ct. at 1798 (quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979)), and commercial activity is "an area traditionally subject to government regulation," *Edge Broadcasting*, ___ U.S. at ___, 113 S. Ct. at 2703 (quoting *Ohralik*, 436 U.S. at 456). The government's greater interest in, and

authority over, regulation of commercial activity gives it greater interest in, and authority over, regulation of "the expression itself," *Edenfield*, ___ U.S. at ___, 113 S. Ct. at 1798, than it has with respect to other forms of expression.

Certain commercial activities, such as gambling and the sale of alcoholic beverages, have traditionally been considered to pose particularly great risks of social harm. See, e.g., *Posadas*, 478 U.S. at 341 (casino gambling); *Stone v. Mississippi*, 101 U.S. 814, 818 (1880) (lotteries); Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, Tit. VIII, § 8001(a)(3), 102 Stat. 4518, 4519 (codified at 27 U.S.C. 213, 215) (congressional findings regarding harms of alcohol consumption and abuse). Such activities accordingly have long been subject to particularly close regulation by the States and the federal government. See *Edge Broadcasting, supra* (history of lottery regulation); and *Craig v. Boren*, 429 U.S. 190, 205-206, nn.18-19 (1976) (history of alcohol regulation). Indeed, the States plainly have authority under the Twenty-first Amendment to impose an outright ban on alcohol sales and consumption within their borders. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Similarly, the federal government's authority to regulate alcohol under the Commerce Clause is broad. See, e.g., *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346-347 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-276 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712-713 (1984); *California Retail Liquor Dealers Ass'n*, 445 U.S. at 108-110; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

The particularly strong governmental interest in regulating activities such as alcohol consumption gives rise to a concomitantly strong interest in regulating speech promoting those activities. Cf. *Edenfield, supra; Posadas,* 478 U.S. at 345-347. By the same token, because such speech is "linked inextricably" (*Edenfield,* ___ U.S. at ___, 113 S. Ct. at 1798) to a socially harmful activity, it warrants even less protection under the First Amendment than other forms of commercial speech. Thus, the balance of interests tips more sharply in favor of upholding a regulation of speech in this area than in other areas of commercial activity. For that reason alone, any doubt as to whether Rhode Island's advertising restriction satisfies the *Central Hudson* test for regulations of commercial speech must be resolved in favor of upholding the restriction.

Bellanca, supra, involved a First Amendment challenge to a statutory prohibition on nude dancing in establishments also holding liquor licenses. This Court affirmed its earlier position that a state has *absolute* power under the Twenty-first Amendment to totally prohibit the sale of liquor within its boundaries. *Id.* at 715, *citing Ziffrin, Inc. v. Reeves,* 308 U.S. 132 (1939). It is equally well established that a state has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold. *Id.* This Court cited *California v. LaRue, supra,* where the constitutionality of a statute prohibiting acts of gross sexuality in establishments licensed by the state to serve liquor was attacked. Although the Court found that not all of the acts prohibited were obscene, the statute was affirmed as within the state's broad power under the

Twenty-first Amendment to regulate the sale of liquor. The Court declined to restrict the application of the Twenty-first Amendment only to the Commerce Clause. Rather, the Supreme Court affirmed that the Twenty-first Amendment's sweep in such cases is broad. Again in *Bellanca*, this Court stated "pursuant to its power to regulate the sale of liquor within its boundaries, [the State] has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs". *Id.* at 717.

Petitioners would have this Court believe that all alternative forms of liquor control must be exhausted before the advertising restrictions could be utilized. This is simply contrary to all teachings of this Court, and the lower federal courts. As the First Circuit noted "[t]he State is entitled to a reasonable choice. This includes choice of method – it is not obliged to prove that some other method, e.g., taxation, would be less effective." (citing *Fox, supra*). 39 F.3d at 7, Pet.App. 6. The restriction cannot be challenged on the ground that price wars could be combatted just as effectively by increasing the State's sales tax. As this Court explained in a similar context, "it is up to the legislature to decide whether or not such a counterspeech policy would be as effective" as the advertising restriction. *Posadas*, 478 U.S. at 344. The fourth part of the *Central Hudson* test does not force the State to choose between the two methods of regulation. See *Dunagin*, 718 F.2d at 751 & n.9.

CONCLUSION

It is clear from the facts and law recited above that the decision of the First Circuit is not in conflict with any other Circuit. No intercession by this Court is necessary. Further, precedent as established in *Queensgate, supra,* mandates denial of the Petition. Finally, since the First Circuit correctly articulated and applied the burden of proof, this Petition should be denied, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

REBECCA TEDFORD PARTINGTON
Special Assistant Attorney General
Department of the Attorney General
72 Pine Street
Providence, RI 02903
(401) 274-4400 Ext. 2303

Attorney for Respondent
State of Rhode Island